

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 06-4701 (DSD/JJG)

Gregory L. Arens, Thomas E.
Clements, Charles A. Crosby,
Michael D. McCabe, James E.
Retterath, and John R. VanDenover,

Plaintiffs,

v.

ORDER

Hormel Foods Corporation,

Defendant..

This matter is before the court upon plaintiffs' objection to the report and recommendation of United States Magistrate Judge Jeanne J. Graham dated May 16, 2007. In her report, the magistrate judge recommended that defendant's motion to dismiss be granted. However, the magistrate judge further recommended that dismissal be stayed pending plaintiffs' opportunity to object to the magistrate judge's determination that the original complaint fails to state a claim upon which relief can be granted or, absent such objection, this court's determination that a stay of dismissal is warranted, which would trigger a fourteen-day time period for plaintiffs to file an affidavit with a proposed amended complaint attached that cures the deficiencies found by the magistrate judge. In the event this court orders a stay of dismissal, the magistrate judge

recommended a briefing schedule that would permit the magistrate judge to take the proposed amended complaint under advisement without an additional hearing.

On June 25, 2007, plaintiffs filed an amended complaint without leave of court and contemporaneously filed objections to the report and recommendation. Plaintiffs object to the report and recommendation only insofar as they argue that the recently filed amended complaint renders defendant's motion to dismiss moot. Plaintiffs agree with the magistrate judge's suggestions but argue that under Federal Rule of Civil Procedure 15(a) they have a right to file the amended complaint because defendants have not filed an answer and the pending motion to dismiss is not a responsive pleading for purposes of Rule 15(a).

The court reviews the report and recommendation of the magistrate judge de novo. 28 U.S.C. § 636(b)(1)(C). However, the court only makes a de novo determination of "those portions of the report or specified proposed findings or recommendations to which objection is made." Id. In their objection, plaintiffs do not argue that the magistrate judge erred in determining dismissal of their complaint was warranted for failure to adequately plead a disability discrimination claim under the Americans with Disabilities Act. Because plaintiffs have not objected to any portion of the report or recommendation but rather agree with the

magistrate judge's determinations, the court adopts that report and recommendation [Doc. No. 21] in its entirety.

The court further finds that a stay of dismissal is warranted pending further briefing and an opportunity for the magistrate judge to review the currently filed amended complaint and to determine the propriety of its filing and whether leave to amend the complaint was necessary or warranted. To the extent plaintiffs have articulated new legal arguments regarding their ability to file the amended complaint as of right and thereby render the pending motion to dismiss and effectively the report and recommendation addressing that motion moot, the court recommits the matter to the magistrate judge to address plaintiffs' arguments in the first instance.

Therefore, **IT IS HEREBY ORDERED** that:

1. Defendant's motion to dismiss [Doc. No. 11] is granted.
2. Dismissal of this action is stayed pending the parties' compliance with the briefing schedule established by Magistrate Judge Jeanne J. Graham, a ruling by the magistrate judge whether leave to file the amended complaint was needed or warranted and a further recommendation whether the court should grant the motion to dismiss or deny the motion as moot.

Dated: July 16, 2007

s/David S. Doty
David S. Doty, Judge
United States District Court